1890-031 Chancery Causes: H. S. Kane vs. J. J. Kelly &c
Lee Co

[Johnson, Moon, Virginia Tennessee & Carolina Steel & Iron Co]

CH Contract Dispute
T - Property

To the Hon. H. S. K. Morison Judge of the Circuit Court of Lee County Virginia

Your Orator Henry S. Kane who humbly complaining respectfully represents that on May the 7th. 1889, He consummated and closed a trade with one John L. Kelly of said County, whereby the said Kelly assigned and transferred to your Orator the sum of $12,000. of a purchase money note executed to said Kelly by one E. B. Moon for the sum of $44.725.35. bearing date 16th. Oct 1888, due and payable on the 28th day of Nov. 1888, but by an endorsement thereon, extended for one two and three years from which extension of time bears date 16th. Oct. 1888, and was to be paid in equal installments of $8948.07 But of this said note the sum of $5835.33 was on said 16th Oct 1888 assigned to R. E. McCoy; and on the 18th Feb. 1889; the sum of $14083.29. was assigned to L. B. Richmond, and said note plus

in the said Richmond, hands
The residue thereof was repre-
sented by said Kelly as belong-
ing to him, and placed in said
Richmond, hands for collection
The said Kelly for the assign-
ment made your orator of the
$12.000, first aforesaid, agreed to
accept and did accept a
note due your orator for
the purchase money of land
sold in Scott County to one
Wm D. Jones, this note so exchanged
was for the sum of $10.000.
made payable two years after
date and bears date on the
day of 1887. The interest on
which said note was to be
paid annually at the beginning
of each year, The residue of
$2000.00 (said Kane) your orator
was to pay in cash so soon
as said Kelly endorsed on said
Moon note the assignment
agreed upon; And upon which
your orator was to assign
without recourse upon him
the said Jones $10.000. purchase

money note. The said Moore note was not present, and the said Kelly entered into a written agreement, as above stated binding himself to make said assignment of said Moore note that is $12,800 of it to your orator within sixty days from the date of said Contract May 7th, 1889.
The said Moore had executed a deed of trust on valuable Coal & Mineral lands to secure the debt aforesaid, and sale was made thereof, and the Virginia & North Carolina Steel & Iron Company became the purchasers thereof, and executed their notes instead of said Moore and the said Moore's note was Canceled & given up.
Before this was done however your orator several times applied to said Kelly, for the assignment of the Moore note as agreed upon by him, and offered and was ready to pay the $2000.00 cash and deliver the $10.000. Jones note as agreed upon. He at all times was ready and able to perform

said Contract fully upon his part. But said Kelly refused and neglected so to perform upon his part. Your orator alleges that the notes now due the said Kelly as aforesaid by the said Iron & Steel Company, are in substance & in fact the Moon notes and is in equity the rightful property of Your orator - and should be by said Kelly assigned $12.000 thereof to Your orator. Upon which is still ready and abundantly able to pay said $2000.00 and deliver the said Jones, $10.000. purchase money note assigned to said Kelly without recourse upon Your orator. The failure of the said Kelly to comply with his Contract has greatly damaged Your orator in depriving him of the use and present management of said money. But he alleges that it still is in the power of said Kelly to comply with his said written agreement to assign so much of the purchase money notes of the Moon sale as he agreed upon

and such assignment is will be agreeable and acceptable to your orator.-
A copy of said Contract is herefiled marked "B" "K" and is prayed to be considered herewith.
The object of this bill therefore is to compel said Kelly to specifically perform said Contract and make said assignment or if not now practical that he do assign a like amount, $12,000 of the notes of the "Virginia & North Carolina Steel & Iron Company notes.- They being in lieu of the said Moon note.
The prayer of your orator therefore is that said John L. Kelly be made a party defendant to this bill and answer the same but he need not do so upon oath that being expressly waived.- And upon a hearing a decree be rendered compelling him to keep and perform his said Contract, and make the assignment agreed upon by him.- And for all other further and general relief may seem suppressed.

A. L. Prudemore
p. q.

C 7.60
S 50
$8.10

Deftrs
C 2.34

P

A. S. Kane

vs Bill Chy

J. J. Kelly

1887 2nd Rules in Sept. Bill
filed Sha Ex dt D.T.
" 1st & 2 Oct. Rules Cont'd
" 1st Nov. Rules D.T. Cont'd
2 " " Cause set
for hearing by Pltff.
1890 Amd Bill filed
Rules & Cont'd
" Sept Dismissed
By Pltff.
G. B. 295

To the Hon. H. S. K. Morison
Judge of the Circuit Court of
Lee County Va.

The amended and suplemental bill of H. S. Kane, to an original bill filed by him and now pending in the Circuit Court of this County; against J. J. Kelly

Your orator here reiterates and adopts his original bill so far as the facts are therein stated, but in addition thereto would state that the defendants answer in that cause, discloses new facts which renders as he is advised an amendment necessary.

By an inspection of the original bill and the exhibit therewith filed it will be seen that on the 7th. day of May 1889 the said Kelly defendant therein undertook on the conditions therein setforth, to assign to your orator $12.000.00 of a note executed to him for the sum of $44.725 25 by one E. B. Moon, and represented by him to them, be in the hands of J. B. Richmond for collection and out of which said note

the said Kelly had before that day assigned to said Richmond the sum of $14,083 19. and $5838. 33 to one H. E. McCoy, and the said Kelly represented the residue to belong to himself, and was the purchase price of valuable Coal lands sold by him to said Moon, and was secured by deed of trust & vendors lien:

Your orator here refers to the original bill for a statement of the assignment transfer, complicence upon his part and failure of the said Kelly, as fully as if here again repeated.

But by the said Kelly's answer he says on the first of May he had assigned to J. M. Johnston* also the sum of $15.000 of this same note making in all $34.921.52, assigned by him before the 7th of May - which is not admited by your orator but upon the contrary he alleges that the assignment to Johnson was after the 7th of May, and he believes that said statement is only made to avoid the contract with your

crator - But if true it would still leave $9.803.73 of said Moore note still on that day due the said Kelly subject to be appropriated on this assignment - And for the residue $2.196.27 - The said Kelly is personally solvent and good

But having thus appropriated of the note assigned or agreed to be assigned the sum of $2.196.27 your crator is advised it is to the extent of $2000.00 but in substance a retaining of the cash payment agreed to be made by your crator to him and the said Kelly would only have to pay the small sum of $196.27 to complete his assignment, to your crator should all that he say be found correct.

Your crator is informed believes and charges that said Kelly by virtue of his deed of trust, had said land sold by the trustee, and the "Virginia Tenn & Carolina Steel & Iron Co" an incorporated body purchased the same for the price agreed to be paid by said Moore, paying a large sum in cash, which was

paid over to said J. B. Richmond and H. E. McCoy on their assignment, and for the residue said Incorporation, executed its notes payable at a future day, the date & amount of which are unknown to your orator.

~~Partnership trustee and agent of said Virginia Iron and Carbonate Steel Company from beginning the day of sale fall knowledge of your orator assignment.~~ But soon after said sale & purchase said Moon instituted in the Circuit Court of Wise County, legal proceeding to set aside said sale and have himself restored to his right under his purchase, and asking the privilege to pay said note - which of these two purchasers therefore will ultimately be liable for the payment of the E. B. Moon note, in which your orator claims the said assignment is unknown to him.

But he is advised that Courts of equity follow the substance, and that who ever may be declared

the payee of said debt, should be directed to pay the same over to your orator and not to said Kelly.

Your orator reiterates, that he made this trade with said Kelly upon the terms at the time and for the consideration set forth in the copy of the exhibit filed.

That he was ready, willing and able to perform the same upon his part and still is as able & willing.

Your respondent is advised that said Kelly could not now deny that on the 7th of May he was the owner of $12.000 of said note his own solemn representations estops him

His answer informs your orator that since his assignment he has received upon said Moore note or from Sand Iron & Steel Co in cash $15.000, and hence is unable to perform his contract. If such is the fact, your orator is advised he received it in trust for your orator, and is bound in law equity & good morals to pay

it over to your orator on his assignment, and the receipt of this money may serve to explain why said Kelly now so petulantly tells us he can not perform.

Your orator is further advised that if said Kelly has since the 7th. day of May by his own voluntary act put it out of his power to perform he can not plead this as "no man can take advantage of his own wrong." Your orator alleges that said Kelly is abundantly able to perform his agreement by securing to your orator the payment of the amount assigned him on the times stated, and if he falsely represented his ownership or has since put it out of his power to perform Equity will compel him to perform his contract by holding him in one instance as security to make good his own representations, and the other ~~as~~ by treating him as trustee, holding the fund in trust for your

crator.
The premises considered your crator prays that J. J. Kelly, ~~J. B. Richmond~~, J. M. Johnson, E. B. Moon, and the Virginia Tenn & Carolina Iron & Steel Company be made parties to this bill & that they answer, the same fully and state all the facts within their knowledge, when said note was assigned to each for what sums when payable, but no relief is sought from said ~~Richmond or~~ Johnson but ~~they are~~ the is made parties pro forma. It is prayed that E. B. Moon or the Virginia Tenn Carolina ~~Iron~~ & Steel Co, be decreed to pay to your crator whatever sums may be due from them to J. J. Kelly over to your crator to the discharge of his assignment, that said J. J. Kelly be held liable as trustee for whatever sums he has received on said note since the assignment or agreement to assign said note and required to pay the same over to your crator. That if so much be due he be required to assign the

same on E. B. Moore or the Virginia Iron & Steel Co to your orator. That he be held personally liable for the said $12000. Should it be ascertained that at the time the said Kelly agreed to make said assignment he was not the true owner of the amount so sold and represented by him. He prays that said Kelly be held liable for $2000 the cash payment, so assigned said Johnson, and not disclosed to your orator should it turn out that Johnson's assignment is the older and that said Kelly be required to assign the residue and make good the deficiency - The defendants are expressly excused from answering on oath. If mistaken in the relief to which your orator may be entitled he asks for such as the merits of his case demands or as in equity he may be entitled. And for all other further general relief may serve & c.

A. L. Pridemore

P

A. S. Kane

vs Amended Bill

J. J. Kelly et al

1890: 1st March
Rule to Amended
Bill filed. Sheq
as replied by L. F.
Duncan Atty. &
D. Nise
" 2nd March Rule
D. N. Confirmed

To The Honorable A S H Morison Judge of the Circuit Court of Lee County Va

The Demurrer and answer of John J Kelly to a bill Exhibited against him in this Honorable Court by H S Kane,

Respondent says complainants bill is not sufficient in law to call upon him to answer in this Honorable Court but that there is good cause of demurrer thereto and he demurs accordingly and prays judgement of his said demurrer

And not waiving said demurrer but relying and insisting thereon should it be and further answer be required of him answering he says that it is not true that on the 7th day of May 1889. That the complainant Henry S. Kane consumated and closed a trade by which this respondent assigned and transferred to the said Kane the sum of $12.000 of a purchase money note executed to this respondent by one E. B. Moore for the sum of $44.725.35 bearing date 16th day of October 1888. due and payable on the 23rd day of November 1888 Nor was such a transaction ever closed and consummated between complainant and respondent at any time.

It is true that respondent was on the 7th day of May 1889. the owner of a note executed to him by E. B. Moore on the 16th day of October 1888 for the sum of $44725.35 of which said note $5838.30 had on the 16th day of October 1888 had been assigned to H E McCoy. and $14083.19 had on the 18th day of February 1889 been assigned to J. B. Richmond and $15.000. was on or about the 1st day of May 1889 and respondent may

and perhaps did tell said Shane on that day. That the residue of said note was then due and owing to him, and that he had placed said note in the hands of Col J.B. Richmond for collection, for such was then the case.

It is true that said Shane did apply to this respondent and attempt to negotiate a trade with him for $12000. of this note and did offer to give this respondent in exchange for said sum of $12000. of said note a. Note on Wm D Jones for the sum of $10.000, and to pay him the sum of $20.00 in cash, but this offer was not accepted by respondent, nor was said Jones note ever transferred to him. Nor was it ever seen by him, nor ever he shown to day even that said Shane has or ever had such a note, or that he has it now, no such note is filed with his bill by said Shane.

Respondent ~~respondent~~ denies that he ever entered into a written agreement as set forth in said bill binding himself to make an assignment ~~to said Shane~~ of $12,000 of said Moon note to said Shane within 60 days from said 7th day of May 1889. Respondent further denies that said Moon ever executed a deed of trust on valuable Coal and Mineral lands or on lands of any kind to secure said debt of $4472.35. or that sale was ever made under any such trust deed. It is true however that said E B Moon did on the 16th day of October 1888 execute a note to him for $1083.33 payable 60 days after date and secure the same by deed of trust. and it is also true that once

that time to wit, on the first day of August 1889 said land was sold under that deed of Trust and the same was purchased by the Virginia Tennessee & Carolina Steel and Iron Co. Respondent does not know how or in what way the payment of the $44725.35 was secured. Nor has he interested himself very much in the matter for as before stated he had on the 16th day of Octo 1888 assigned to A T McCoy $5838.33 of said note and on the 18th day of Febry 1889. $14083.29 to J B Richmond and on the 1st day of May 1889. to John M Johnson. $15,000.00 of said note leaving only yet due to your Orator the sum of $9.803.73, and since that time his atty J B Richmond has paid to him about $1565.00 on this last named sum. So that your honor will see very clearly on that it is not ~~in his~~ Respondent's power to execute the contract claimed by Mr Kane even had such a contract ever been made which is here again denied.

Respondent denies that said Kane ever at any time before said sale above mentioned was made to wit August 1st 1889 ~~was~~ applied to him for an assignment of $12.000 of the Moore note He further denies that said Kane ever befor that time offered to assign to him said Jones note He further denies that said Kane ever paid or offered to pay him said sum of $2.000 before said time.

It is true that about the 2nd day of August 1889. the next day after the sale under the deed of Trust above referred to, said Kane

did safely to your respondent and endeavor to get him to make and execute ~~said~~ trade That is to assign to him Shane $12,000 of said Moon debt and take in exchange therefor without recourse a $10,000 note which he said Shane claimed to have on W. D. Jones, but he did not then tender or show said note to your respondent nor did he offer or tender to him said $2000. As above stated this occurred on the day after said sale under the deed of trust and when, said Shane whom he is informed was present at Big Stone Gap at said sale, had ~~been~~ doubtless learned that the Moon matters had been put in such shape so that at an early day the permanent thing of was likely to be assured. And respondent is advised that this was too late the 60 days claimed by him as the time in which said assignment was to be made had long before expired and said Shane had not between said 7th day of May 1889. and the 1st day of August 1889 offered in anyway to go forward with the negotiation of the trade theretofore talked of between himself and said Shane.

Respondent will now give your Honor a full and succinct statement of all that occurred between said Shane and himself. On the 7th day of May 1889. The complainant Henry S Kane applied to respondent and desired respondent to sell and transfer to him $12000 of the Moon note and offered to sell or transfer to him in part payment thereof a Note for $10,000 which he claimed to hold on one W D Jones and to

pay to him the residue thereof to wit $2,000 in cash. Respondent then told said Kane that said Moon note was in the hands of J B Richmond that he had assigned $5,835.33 of said note to A E McCoy & $14083.27 thereof to J B Richmond and he does not now remember whether he told him of the assignment to McCoy but he told him he had and that he had employed said Richmond to attend to the collection of the whole of said note and to manage the whole matter for him and that he would do nothing whatever in the matter until he first saw said Richmond. and then upon said Kane wrote a letter to said Richmond which as your respondent understood it was only intended to convey to said Richmond the propositions made between himself and said Kane, so that said Richmond his counsel might advise him whether or not to make said trade. but no such thing was intended by him as the paper of which Exhibit B K. is claimed to be a copy, and if said paper B. K. is a copy of said letter it was not written as respondent intended it to be, After said Kane had prepared said letter, he read or pretended to read it to respondent, but he did not read it or at least respondent did not understand it as said Exhibit B. K. now appears to be Respondent denies that said paper "B K." is the letter, or that it contains what he intended to have, and thought was written to said J B Richmond Respondent will here state that he is old and infirm & bad scholar at best and that he did not read over himself the letter written by said Kane to Judge Richmond but that he trusted to said Kane to write it for him

believing that he would do it right but in this he finds he has been wofully mistaken.
Respondent denies that said paper "B K" is a contract or agreement or any evidence thereof it is only a letter written by respondent (even if said paper is a true copy of his letter) to his counsel and there is no mutuality in it, or nothing whatever binding said Kane and respondent is advised that all executory contracts to be enforced must be mutual
Respondent denies that his failure to make said assignment of $12000 of said Moon note to said Kane has in any way damaged him he still has his Jones note if he ever had it and he still has as respondent supposes his $2000. if he ever had it. and respondent fails to see wherein he is in anyway injured unless he is hurt in his feelings because of his failure to get off on an old man a note not due for 7 or 8 years and perhaps badly secured, and without recourse.
Respondent denies that it is still in his power to assign $12000. of said Moon note to said Kane even if he had ever agreed to do so, because as heretofore stated there is only ~~Moon~~ due him on said Moon debt about $8,218 and for the further reason, if the allegation of the bill are true the Moon note was cancelled and given up. and there is no longer a Moon debt
And your respondent having fully answered all that he is advised that it is necessary or material for him to answer prays to be hence dismissed with his

reasonable costs about his defense in this behalf most wrongfully expended

Duncan & Mathews for Respondents

J. J. Kelly

Virginia In Lee County to wit

I John R Gibson Clerk of the County Court of the County aforesaid in the state aforesaid do certify that John J Kelly this day personally appeared before me in my County aforesaid and made oath that the facts contained in the foregoing answer so far as made of his own knowledge are true and so far as made from information derived from others he believes to be true

Given under my hand this 4th day of December 1889

John R. Gibson Clerk

John J Kelly

vs. Answer

W S Kane

Filed Dec 4th 1887

J R. Gibson D.C.

Brick Store Lee County Virginia
May 7th 1889

(Copy)

Col James B Richmond
Estillville Va

Dear Sir

I have this day agreed to sell Henry B. Kane Twelve thousand dollars of the purchase Money Land note on E B Moore Executed for the sum of forty four thousand seven Hundred and Twenty five $\frac{35}{100}$ dollars to me on the 16th day of October 1888. bearing interest from date, and due and payable on the 23rd day of November 1888. by an Endorsement on the back of said note also Made on the 16th day of October 1888. the time for payment of said note is extended for one, two, three, four, & five years, from said day in equal Installments of $8948.07 Each. of this note the sum of $5838.$\frac{33}{100}$ was on the 16th day of October 1888 assigned to A E. McCoy. and on the 18th day February 1889 the sum of $1408.$\frac{29}{}$ was assigned to J. B Richmond, and the balance of said note is due the undersigned Kelly, and said note was placed in said Richmonds hands for collection on the 18th day of February 1889. And I have agreed and hereby agreed to to take a note due said Kane from Wm O. James for Ten thousand dollars without security on said Kane as part payment

on said Twelve Thousand dollars of the purchase money land note sold said Kane. on the said Moon. said note that said Kane is to let me have on Wm. O. Jones is payable Ten years after date, by the interest on the principle of said Jones note, is payable at the beginning of each year, said note of said Jones was Executed to said Kane in the year 1887, and is for purchase money on land, The balance said Kane will be due the undersigned Kelly he is to pay in cash as soon as the undersign Kelly assigns said Kane the Twelve Thousand dollars of the aforesaid $4725.35 purchase money land note on E. B. Moon, And said assignment is to be made inside of sixty days from this date. Given under my hand this the 7th day of May 1889.

J J Kelly

A True Copy

Test.,
H. C. L. Richmond.

This Exhibit is rejected to as evidence in this case because it purports to be a copy of ~~and~~ a letter to a stranger to the ~~alleged~~ contract sought to enforced. and because there is no evidence whatever that it is a copy of any paper that ever had an existence or at least of any paper ever executed by J. J. Kelly

Dec 3rd 1889.

Duncan & Mathews for
J. J. Kelly.

"B"

A true copy of contract between A. Blanc & J. J. Kelly.

The Commonwealth of Virginia.

To The Sheriff Of Lee County Greeting:

We Command You to Summon J. J. Kelly, J. W. Johnson, E. B. Moon and the Virginia Tennessee & Carolina Steel and Iron Co. an incorporation doing business in Va

To appear at the Clerk's Office of the Circuit Court of Lee County, at the Courthouse on the first Monday in March next, being rule day to answer an amended bill in Chancery exhibited in our said Court against them by D. S. Kane

And have then and there this writ. Witness, J. A. G. Hyatt, Clerk of said Court at the Courthouse. This 21st day of February 18 90, in the 114 year of the Commonwealth.

J. A. G. Hyatt Clerk.

A Copy Teste

(A. L. P.

H. S. Kane
vs } Spa in Chy
on amend. Bill
J. J. Kelly et al

To 1st March Rules 1890

I accept legal service of this Spa, Feby 24th 1890
C. T. Dimon Atty for Defendants

The Commonwealth of Virginia.

To The Sheriff Of Lee County Greeting:

We Command You to Summon John J. Kelly

To appear at the Clerk's Office of the Circuit Court of Lee County, at the Courthouse on the ~~first~~ third Monday in September next, being rule day to answer a bill in Chancery exhibited in our said Court against him by Henry B. Kane

And have then and there this writ. Witness, J. A. G. Hyatt, Clerk of said Court at the Courthouse.
This 10th day of Septr. 1887, in the 114 year of the Commonwealth.

J. A. G. Hyatt *Clerk.*

A Copy Teste

(P

Henry S. Kane
Spa. in Chcy
vs
John J. Kelly

To 2nd Rules in Sept. 1889.

Executed by delivering to John J Kelley an office copy of the within Spa in Chy this Sept The 18th 1889

P M Reasor Depy
for A. B Munsey
S. L. C.